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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CLIVEN D. BUNDY,
RYAN C. BUNDY,
AMMON E. BUNDY,
RYAN W. PAYNE,
PETER T. SANTILLI,
MEL D. BUNDY,
DAVID H. BUNDY,
BRIAN D. CAVALIER,
BLAINE COOPER,
GERALD A. DELEMUS,
ERIC J. PARKER,
O. SCOTT DREXLER,
RICKY R. LOVELIEN,
STEVEN A. STEWART,
TODD C. ENGEL,
GREGORY P. BURLESON,
JOSEPH D. O'SHAUGHNESSY,
MICAH L. McGUIRE, and
JASON D. WOODS,

Defendants.

2:16-CR-00046-GMN-PAL

GOVERNMENT'S MOTION FOR PROTECTIVE ORDER AND SUPPORTING MEMORANDUM

The United States, by and through undersigned counsel, respectfully submits this Memorandum in Support of its Motion for a Protective Order pursuant to Rule 16(d)(1) of the Federal Rules of Criminal Procedure, seeking to prevent the dissemination of discovery materials and information outside the defense team and for use only to assist the defense in the investigation and preparation of this case.

INTRODUCTION

By this motion, the United States respectfully requests that the Court enter a protective order pursuant to the authority provided in Rule 16(d) of the Federal Rules of Criminal Procedure. Attached at Exhibit 1 is the government's Proposed Protective Order (hereinafter "PPO").

During informal pretrial conferences, the government represented to counsel for the defense that it intended to seek a protective order in this case to limit the dissemination of discovery information outside the defense team. The government circulated its Proposed Protective Order to counsel before the scheduling and case management conference held by the Court on April 22, 2014.

At the scheduling conference, the government further represented to the Court that the timing of the disclosure of Phase III of discovery was contingent, in part, on whether a Protective Order is entered in this case. Following that conference, the Court issued a Case Management Order (C.R. 321), allowing the parties until April 29, to file their proposed protective orders or oppositions. This filing constitutes the government's PPO and position.

Counsel for defendant Ricky Lovelien has indicated to government counsel that he will agree to the PPO. Defendants Cliven Bundy and Dave Bundy indicated to government counsel that they oppose the PPO and have filed oppositions (C.R. 349 and 347, respectively). Scott Drexler (who expressed reservations) and Ryan Bundy have thus far not provided a position. Ryan Payne has filed an opposition (C.R. 331) that was joined by Jason Woods (C.R. 337), Joseph O'Shaughnessy (C.R. 340), and Ammon Bundy (C.R. 331). Ammon Bundy also filed a separate opposition (C.R. 333) that was joined by Jason Woods (C.R. 338) and Brian Cavalier (C.R. 348). Peter Santilli filed an opposition (C.R. 315) that was joined by Mel Bundy (C.R. 335), Gerald Delemus (C.R. 322), Steven Stewart (C.R. 326), Todd Engel (C.R. 325), Gregory Burleson (C.R. 328) and Micah McGuire (C.R. 330).

GOVERNMENT'S POSITION

Rule 16(d) provides that the district court may, for good cause, deny, restrict or defer discovery or inspection or grant other relief including the issuance of protective order. A protective order that limits a criminal defendant's disclosure of discovery materials is an appropriate use of the court's discretion. *Alderman v. United States*, 394 U.S. 165, 185 (1969) ("[T]he trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect."); *see also United States v. Campa*, 529 F.3d 980, 995 (11th Cir. 2008) (recognizing "[t]he broad authority of the district court to regulate discovery" in a criminal case); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36

(1984) (noting that the "trial court is in the best position to weigh the fairly competing needs and interests of the parties affected by discovery.

The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."). *See also United States v. W.R. Grace*, 526 F.3d 499, 509 (9th Cir. 2008) (en banc) (District courts "have inherent power to control their dockets.") (quoting *Atchison, Topeka & Santa Fe Ry. Co. V. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998)). The transmission and use of discovery is meant to be a private process between the litigants and that discovery materials should generally not be disclosed outside of those individuals who are necessary for preparation for trial. *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) ("Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private.").

In this case, the government seeks a protective order to protect victims, witnesses, law enforcement officers, and agent/investigators associated with this case from threats, intimidation, and harassment from supporters of the Bundy defendants. The history of this case shows that Bundy supporters used various social media outlets such as YouTube, Twitter, and Facebook to threaten and intimidate law enforcement officer/witnesses/victims in connection with impoundment operations at Bundy Ranch and thereafter. At Exhibit 2, the government has compiled but a few examples of the cyber-bullying tactics used by

Bundy supporters, redacting personal identifying information and images where necessary (redactions depicted by black boxes).

One such example is an April 13, 2014, post on the "Stand with the Bundys" Facebook page. There, a supporter posted an image of a BLM Ranger involved in impoundment operations together with his home telephone number and the message: "A participant in this week's Bundy escapade . . . BLM Ranger [name redacted] Home [address redacted]." Exhibit 2, Example # 5. Thereafter, others posted the following to the same page:

> [poster name redacted]: Call him from a land line
>
> [name redacted/different poster]: Do a reverse look up of his number you will be surprised
>
> [name redacted/different poster]: St. George UT is where this number is from
>
> [name redacted/different poster]: I know my people in St. George won't be happy about that. I will definitely share this!!!!

As these posts show, supporters of the Bundys used social media to discover information about a law enforcement officer and then released the information to others, calling for others to harass their victim with pointless and threatening telephone calls, and seeking still others ("my people in St. George") who lived near their victim to join in their bullying tactics to intimidate and make it uncomfortable for the victim.

The tactics employed by Bundy supporters were not limited to law enforcement officers, but extended as well to civilians involved in the impoundment as well, as shown in an April 2, 2014, posting to a Facebook page associated with a Bundy supporter:

> EVERYONE PLEASE CALL
>
> [redacted personal identifying information of civilian contractor]
>
> They need to know what they are doing is NOT right and that we notices (sic) it and we are a shamed (sic) of them!
>
> I was taught to be honest in all my dealings! idk what they were taught!
>
> CALL THEM! AND PASS THIS ONE (sic)!!!

Exhibit 2, Example # 19.

The evidence shows that following this and similar posts, the contractor was inundated with anonymous, threatening and intimidating telephone calls, calling the contractor foul names, hanging up, and threatening death. Other civilians associated with the impoundment suffered similar treatment. See Exhibit. 2, Examples # 20 and 21.

The harassment and intimidation continued well after the impoundment operation ceased due to the assault against law enforcement officers. The government has already placed on the public record that on or around November 6, 2014, the Special Agent in Charge of the impoundment operation received a voicemail message from defendant Peter Santilli. In the message, among other things, Santilli and an associate of his stated:

> Associate: [ ] Mr. Love, I was thirty feet away from you [referring to the Bundy Ranch assault] . . . you work for a cartel . . . Remember Mr. Love, **your family will also be destroyed** at the time when they no longer need you to do the evil things you do. . . .

* * *

> Santilli: If you don't turn in favor of the constitution and the people, **you are not going to live a happy life here on earth sir**. You are outnumbered. My listenership alone, o.k. will respond to Bundy Ranch if you go anywhere near it. I need to tell you that. . . . We don't recognize the BLM. We don't recognize your authority. We will have your guns taken away. We will have you incarcerated. . . .

(emphasis added)

Nor were the bullying and harassment tactics limited to cyberspace or to those connected with the assault of April 12, 2014. For example, since the indictment of the common defendants charged in connection with the Malheur Wildlife Refuge takeover (Ammon and Ryan Bundy, Ryan Payne, Peter Santilli, Brian Cavalier, Joseph O'Shaughnessy, and Blaine Cooper), the judges associated with that case have apparently received a number of threatening calls. As noted by the District Judge in that case when overruling objections to a protective order similar to the one sought here:

> . . . the Court notes judges of the court affiliated with this case have been inundated with communications from non-parties who have, in some cases, conveyed harassing and threatening messages and, in any event, have clearly attempted to influence these proceedings. Although the Court is able to shield itself from such messages, the risk of exposing potential witnesses to such contacts would create an undue risk of prejudice to the ends of justice, the government, and at least some defendants.

U.S. v. Ammon Bundy, et al., 16-cr-00051-BR (C.R. 446 at 4); *see also*, Exhibit 2, Example # 15.

The government further notes that since the Superseding Indictment was filed in this Court, counsel for the government – whose names and business address are required to be placed on publically filed pleadings – have each received through the mail, communications addressed to them at work that contain language designed and intended to threaten and intimidate.

As the Court has already found, the discovery in this case is voluminous, involving hundreds of hours of video recordings and many hundreds of photographs, either obtained or recorded by law enforcement officers. Many of the video recordings will contain images of witnesses, victim-law enforcement officers, or law enforcement officers/agents involved in the investigation.

Further, the investigative reports associated with these recordings (designated as Phase III of discovery production) will reveal the name(s) of the investigating agent (s) and/or the names (or other identifying information) of persons/witnesses/victims depicted in a photo or video. Other investigative reports the government intends to produce in Phase III will likely contain information related to witnesses or potential witnesses and victims.

As the District Court in Oregon noted, government counsel and the courts have the means to shield themselves from attempts to threaten and intimidate. But that is not necessarily so with victims and witnesses in this case. cyberbullying, threatening communications, and intimidation coming from anonymous supporters passing images around in micro-seconds to untold numbers of others, seeking information or passing threatening communications, have the potential to prejudice the truth-finding function of a trial by influencing potential witnesses or chilling their willingness to testify.

The Advisory Committee notes to the 1974 amendments to Rule 16 state, "Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed." *See also, e.g.*, *United States v. Pelton*, 578 F.2d 701, 706-07 (8th Cir. 1978) (court properly issued a protective order preventing defendant's access to tape recordings in light of government's concern for the safety of cooperating sources whose identity was disclosed in the recordings); *United States v. Fuentes*, 988 F. Supp. 861, 866-67 (E.D. Pa. 1997) (permitting defense counsel to disclose witnesses true identities only to the extent necessary to investigate the witness in preparation for trial); *United States v. Zelaya*, 336 F. App'x 355, 357-58 (4th Cir. 2009) (upholding protective order permitting police officers from El Salvador to testify under pseudonyms, without disclosure of their true names to the defense, where government established genuine threat to the witnesses' safety from the MS-13 criminal gang and defense had sufficient information about the witnesses to conduct an effective cross-examination). Here, to the extent history serves as prologue, the threat that information about victims and witnesses will be released into cyberspace and used to attempt to influence and harass is palpable.

The government intends to attempt to redact many of the investigative documents to remove names of agents and witnesses but that still does not address the potential nefarious use of images and social media postings, or the fact that despite best efforts, errors in redaction will likely occur. Simply put, discovery in this case is replete with third-party and witness information. As the government has represented previously, hundreds of people, law enforcement and non-law enforcement, participated in, or were witness to, the events giving rise to the Superseding Indictment in this case. This includes numerous potential subjects and witnesses who form a part of the government's ongoing investigation in this case.[1]

Given the incredibly voluminous nature of this case, these third-party references cannot be entirely redacted, nor would doing so be beneficial to the parties. As can be seen by the redactions found in the few sample postings at Exhibit 2 (typical of discovery in this case), the time necessary to redact personal identifying information from thousands of pages of Facebook postings alone would be time-prohibitive, let alone redacting images from video or photographs.

The government and the defendants each have an interest in producing discovery expeditiously. The protective order proposed herein will assist in accommodating the timely production of discovery while balancing the need for the government to protect victims and witnesses from harassment and intimidation.

In his opposition, defendant Ammon Bundy suggests that the procedures set out in the PPO should be reversed to require the government to make a particularized showing as to each document/video/photograph for which it seeks protection. But that is wholly impracticable given the volume of discovery in this case. As the Court in Oregon noted when discussing the Protective Order entered there:

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[1] Government counsel indicated it did not intend to add additional defendants to the current indictment in the court's status conference of April 22, 2016. That representation continues to be accurate and to accommodate the court and these defendant's needs to manage the case as it goes forward. Nonetheless as the investigation develops further, others may be charged separately.

> [T]he Court notes the Bundys' proposed method of requiring the government to make a specific showing of necessity as to each document that it seeks to protect is wholly impractical. The Court is already requiring the government to produce an extraordinarily large amount of discovery in a relatively short period. Requiring the government also to make a specific showing of necessity as to each document that it deems necessary to protect would substantially slow the rate at which the government could process and produce discovery [….]

U.S. v. Ammon Bundy, et al., 16-cr-00051-BR (C.R. 446 at 5).

Santilli claims that any document filed with motions will need to be filed under seal. That is not so, nor is it provided for in the protective order. If there is a genuine litigation need to attach pages of discovery to a motion or other filing, nothing in the protective order precludes doing so. Certainly defense counsel can exercise their discretion not to unnecessarily expose third parties and their personal information to public scrutiny where there is no need to do so.[2] The order also gives the defense broad latitude to communicate discovery information with whomever they deem is necessary to prepare an effective defense, without any specific limitation.

It is, therefore, requested that this Court order that the discovery material provided in this case may be disseminated only to the following individuals:

(1) The defendants in this case;

(2) Persons employed by the attorney of record who are necessary to assist counsel of record in preparation for trial or other proceedings in this case; and

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[2] As a general matter, discovery only becomes public when it is filed in connection with a case. *See Bond v. Utreras*, 585 F.3d 1061, 1077 (7th Cir. 2009) discussing *San Jose Mercury News, Inc. v. District Court*, 187 F.3d 1096 (9th Cir. 1999); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) ("[R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.").

(3) Persons who defense counsel deems necessary to further legitimate investigation and preparation of this case.

The government also requests that this Court order defense counsel to provide a copy of the protective order to any person above who receives copies of the discovery.

The government further requests that the protective order allow any person above who receives copies of discovery from defense counsel to use said discovery only to assist the defense in the investigation and preparation of this case, and shall not allow them to reproduce or disseminate the discovery material to any other person or entity.

The protective order shall apply only to materials and documents created or written by the government, or obtained by the government in the course of its investigation or through warrants and court orders. It shall not restrict reproduction or dissemination of discovery materials the defendants obtained in the course of their investigations through open sources.[3]

The government submits that these narrow restrictions appropriately balance the need for the expeditious production of discovery against the need for witness security and protection, while ensuring the case is tried in the courts and not on social media. The sole object and purpose of this protective order is to ensure that the discovery materials are used as they should be, in the preparation of a defense case, and not for any other improper purpose.

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[3] The language in this paragraph varies slightly from that circulated the government's initial draft of the Proposed Protective Order, adding the words "in the course of its investigation" in the first sentence and the words "in the course of their investigations" in the second sentence.

WHEREFORE, for all the foregoing reasons, the government respectfully requests that the Court grant its Motion and enter a Protective Order substantially in the form found at Exhibit 1.

DATED this 29th day of April, 2016.

Respectfully,

DANIEL G. BOGDEN
United States Attorney

____
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Assistant United States Attorneys
NADIA J. AHMED
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Attorneys for the United States

CERTIFICATE OF SERVICE

I certify that I am an employee of the United States Attorney's Office. A copy of the foregoing **Government's Motion for Protective Order and Supporting Memorandum** was served upon counsel of record, via Electronic Case Filing (ECF).

Dated this 29th day of April, 2016.

/s/ Mamie A. Ott
MAMIE A. OTT
Legal Assistant